

## Search and Seizure

### Buccal Swab

#### **Commonwealth v. Draheim**

Supreme Judicial Court, June 27, 2006

*The Commonwealth may compel samples of physical evidence (e.g., DNA) from third parties provided they demonstrate probable cause to believe a crime was committed, and that the sample will probably provide evidence relevant to the question of the defendant's guilt.*

The defendant, a married woman, was indicted for the rape of two teenage boys in separate incidents that each resulted in the birth of a child. The Commonwealth moved to compel the defendant, the victims and the two children to submit DNA samples through buccal swabs (saliva samples) to establish that the rapes occurred. The Superior Court denied the Commonwealth's motions and the Commonwealth appealed.

Defendant Sample: The SJC reiterated the established principle that to overcome the Fourth Amendment protections against unreasonable searches and seizures, the Commonwealth must show: 1) probable cause to believe that the defendant committed a crime; and 2) the sample sought will probably provide evidence relevant to the question of the defendant's guilt. This showing must be made at an adversarial, but not necessarily evidentiary, hearing. The judge may act on an indictment, affidavit, and uncontroverted statements of a prosecutor made and recorded in open court.

Third Party Sample: With respect to the third parties, who are not suspects, (the two children and the two victim teenage boys) the SJC acknowledged this was an issue of first impression and held that the Commonwealth must show: 1) probable cause to believe a crime was committed (as opposed to one necessarily committed by the defendant), and 2) the sample will probably provide evidence relevant to the question of the defendant's guilt. In making its decision, the court should consider factors such as the seriousness of the crime, the importance of the evidence, and the unavailability of less intrusive means of obtaining the evidence. The appropriate procedural mechanism is provided in Rule 17(a)(2), since a buccal swab is considered an "object" for purposes of obtaining "books, papers

documents or other objects" from a third party. "We conclude that so long as the Commonwealth satisfies the requirements of both the Fourth Amendment and Mass. R. Crim. P. 17(a)(2) . . . it should be permitted the same access as defendants to potentially beneficial evidence from third parties."